(4)

No. 91-871

In The

Supreme Court of the United States

October Term, 1991

BATH IRON WORKS CORPORATION and COMMERCIAL UNION INSURANCE COMPANIES,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF FOR RESPONDENT EMPLOYEE

RONALD W. LUPTON
STINSON, LUPTON & WEISS, P.A.
280 Front Street
Bath, Maine 04530
Telephone: (207) 442-8781
Counsel for Respondent Employee

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF THE ARGUMENT

COMPENSATION FOR HEARING LOSS BENEFITS FOR VOLUNTARY RETIREES UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT SHOULD PROPERLY BE DETERMINED UNDER 33 U.S.C 908(c)(13) OF THE LHWCA.

This is a case wherein ambiguity requires interpretation of statutory material. The proper approach, to consider the legislative history and underlying policies to the Act was utilized by the Benefits Review Board in this case. *Director, O.W.C.P., United States Dept. of Labor v. Perini North River Associates*, 459 U.S. 296, 74 L. Ed. 465, 103 S. Ct. 634 (1983).

33 U.S.C. § 908(c)(13) is the proper and the sole basis for calculation of hearing loss benefits under the LHWCA in the case of active and retired workers. *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988). Congress did not intend to use 33 U.S.C. § 908(c)(23) to calculate hearing loss benefits. *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989). Review of the legislative history suggests that Congress did not intend for hearing loss claims by retirees to be compensated under § 908(c)(23). 130 Cong. Rec. H9731 (daily ed. Sept. 18, 1984).

ARGUMENT

I. THE DECISION OF THE FIRST CIRCUIT AND THE DIRECTOR'S ARGUMENT ARE FLAWED BECAUSE THEIR BASIC PREMISE, THAT HEARING LOSS IS AN OCCUPATIONAL DISEASE WHICH IMMEDIATELY RESULTS IN DISABILITY, IS INCORRECT.

The Director argues that Congress, in enacting the 1984 amendments to the Act, especially 33 U.S.C.

§§ 908(c)(23), 910 (d)(2), 902(10), 912(a), 913(a), and 910(i), intended to supply a comprehensive scheme to compensate those suffering from "long latency occupational diseases." Taking issue with the finding of the Benefits Review Board in *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989) and the decisions of the Fifth and Eleventh Circuits in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990) and *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561 (11th Cir. 1991) the Director asserts that occupational noise induced hearing loss is a disease which immediately results in a disability.

The Director correctly notes that if hearing loss were a disease which did not immediately result in disability it would bring into play § 910(i). 33 U.S.C. § 910(i). According to the Director, occupational hearing loss is not a long-latency disease such as asbestosis. On the contrary, says the OWCP, once the employee is removed from the injurious stimulus, intense noise, the disease does not progress. The Director then states that exposure to intense noise **immediately** results in a disability so that hearing loss is not the type of occupational disease described in § 910(i). Indeed, this argument was accepted by the First Circuit. *Bath Iron Works v. Director, OWCP*, 942 F.2d 811, 817.

That this line of reasoning does not hold may be seen by a review of the statutory language and the treatise cited by the Director and the First Circuit. As noted above, the basis for the Director's position that § 908(c)(13) rather than § 908(c)(23) applies to this claim is that hearing loss is not a long-latency disease. Though the phrase "long-latency disease" may be a favorite of the

Director and may have been used in the House Report[1] it does not appear in the statute. Instead, the Act in § 908(c)(23) speaks of claims for permanent partial disability in which the average weekly wage is determined under § 910(d)(2). Section 910(d)(2) applies to claims for disability due to occupational disease for which the time of injury is determined under § 910(i). Section 910(i) applies by its plain language only to "disability due to an occupational disease which does not immediately result in . . . disability . . . " and is the legislative device which sets the "date of injury" for the purpose of determining the average weekly wage for such claims.[2]

In interpreting the statute both the Director and the court below have ignored the Act's definition of "disability", the undisputed medical facts about the development of a noise induced hearing loss, and the undisputed facts about this employee's hearing loss. Hearing loss has long been considered an occupational disease under the Act. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *Machado v. General Dynamics Corp.*, 22 BRBS 176, 179 (1989). Based upon the language used in the statute, though, the inquiry is not whether, as phrased by the Director, it is a "long-latency" disease, but whether in the language of § 910(i) it is a disease which "does not immediately result in . . . disability."

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[1] H.R. Rep. No. 98-570, 98th Cong. 1st Sess., part 1, p. 11.

[2] Under 33 U.S.C. § 910(i) the average weekly wage is the wage the employee is earning when "the . . . claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the . . . disability."

The definition of "disability" is contained in § 902(10) as follows:

> (10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in § 910(d)(2). 33 U.S.C. § 902(10).

Placing the definition of "disability" from § 902(10) into § 910(i) results in the following:

> For the purposes of this section with respect to a claim for compensation for . . . disability . . . due to an occupational disease which does not immediately result in **[incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment]**; or in permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in § 910(d)(2), the time of injury shall be . . .

Whether this claim falls within § 910(i) or not is determined by whether it falls within the disability definition of § 902(10).

First, did this employee's hearing loss, as the Director contends, immediately cause an "incapacity because

of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . " 33 U.S.C. § 902(10). The Act has long been interpreted as requiring actual, not potential, wage loss before the employee is entitled to compensation. Disability under the Act is a hybrid concept with both medical and economic components. It is such incapacity caused by injury which makes an employee actually (not merely potentially) unable to earn the wages he was receiving at the time of his injury. *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970). As was stated in *Owens v. Traynor*, 274 F. Supp. 770 (DC Maryland), *aff'd* 396 F.2d 783 (4th Cir. 1967); *cert. den.* 393 U.S. 962, 21 L. Ed. 2d 375, 89 S. Ct. 401 (1968):

> . . . a Deputy Commissioner is not required or authorized to make such an award under sec. 908(c)(21) merely because there is some anatomical impairment. Anatomical impairment and industrial disability must be distinguished. Section 902(10) defines 'disability' as an 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment'. As the Second Circuit said in *John W. McGrath Corp. v. Hughes*, 289 F.2d at 405, "This definition clearly imposes upon the Deputy Commissioner and the reviewing courts the duty to evaluate the extent of a claimant's disability in economic rather than medical terms."

The error committed by the First Circuit can be readily discerned when reference is had to 942 F.2d 811, 816-817. There in discussing the applicability of the retiree provisions added by the 1984 amendments (what the Court dubbed "System Three") the court below paraphrased the

language of § 910(d)(2) noting that it applies only where the "disability . . . occurs . . . within the first year after the employee has retired . . . or . . . more than one year after the employee has retired. . . . " The Court then went on to say:

> Using ordinary English, however, one would normally say that a worker who becomes deaf before retirement is a worker whose disability "occurs" before retirement not after retirement. Hence the language of Section 910(d)(2) seems not to apply to a worker who becomes deaf at the workplace. 942 F.2d at pp. 816-17.

The Court erred in looking to the "ordinary English" meaning of "occurs" when it should have been ascertaining the statutory definition of the term "disability." Unless there is some "disability" within the statute's definition in the first place, there is no occasion to decide when that "disability" occurs.

As a medical proposition, the Director, citing Sataloff and Sataloff, *Occupational Hearing Loss*, (1987) notes that exposure to intense noise **over many years** can produce a gradual loss of hearing known as occupational deafness.[3] Medically then, though the employee may sustain an

[3] In fact, one of the defining components of occupational hearing loss is that it must have developed over several years. Sataloff, p. 357.

"injury"[4] from the very first exposure to intense noise, it will take years for a "disability" to arise if the employee ever actually does sustain a reduction in wage earning capacity. The employee in this case never did sustain any disability in the economic sense and retired from employment in 1972. Decision and Order of ALJ Martin J. Dolan, Jr., Appendix to Petition for Writ of Certiorari, p. 33 (hereafter: Pet. App.).

At some point this employee's hearing loss progressed to the point where, measured under the provisions of § 908(c)(13)(E), the loss became compensable as a

[4] While a "disability" requires a loss of wage earning capacity, an "injury" does not. Injury is defined in § 902(2):

> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment. 33 U.S.C. § 902(2).

Under this definition it has been held that an injury takes place "when it becomes clinically evident, that is, when it becomes reasonably capable of medical diagnosis." *Eagle Picher Industries*, 682 F.2d 12, 25 (1st Cir. 1982); when "something unexpectedly goes wrong within the human frame . . . ", *Johnson v. Brady-Hamilton Stevedoring Co.*, 11 BRBS 427, 430 (1979), see also *Romeike v. Kaiser Shipyards and SAIF Corp.*, 22 BRBS 491 (1986). Congress intended that "injury" and "disability" are separate concepts. *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 72 S. Ct. 223, 96 L. Ed. 225 (1952). Noting the different definitions contained in the statute, the *Pillsbury* court held: "Congress knew the difference between 'disability' and 'injury' and used the words advisedly." *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 199 96 L. Ed. 225, 229.

scheduled award.[5] The listing of an injury in the schedule conclusively establishes a loss of wage earning capacity. *Travelers Insurance Co. v. Cardillo,* 225 F.2d 137, 144 (2d Cir. 1955).[6] In this particular case, the first evidence of any statutory "disability" suffered by Mr. Brown, (either actual or presumed) is an audiogram administered in 1954, some 15 years after he had started work for the employer. Petition App. p. 33.

Is the Director correct that there is an immediate disability if the second portion of the definition is used? That is, does hearing loss immediately result in "permanent impairment" under the guides promulgated by the American Medical Association? Again the answer is in the negative. Both the second (1984) and third (1988)

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[5] The Act provides three systems for compensating workers suffering from a work related partial disability. *Bath Iron Works Corporation v. Director, OWCP,* 942 F.2d 811 (1st Cir. 1992). Compensation for hearing loss is included under what the court below referred to as "system one" contained in § 8(c)(1-20), 33 U.S.C. § 908(c)(1-20). That section is often called "the schedule" and the afflictions enumerated therein are often referred to "scheduled injuries." *Bath Iron Works Corp., supra.,* 942 F.2d 811, 812. Loss of hearing is, and always has been, the only occupational disease listed in the schedule. 44 Stat. 1427 (ch 509, March 4, 1927).

[6] " . . . Unless an injury results in a scheduled disability, the employee's compensation is dependent upon proving a loss of wage-earning capacity; in contrast, even though a scheduled injury may have no effect on an employee's capacity to perform a particular job or to maintain a prior level of income, compensation in the schedule amount must be paid." *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, 282-283, 66 L. Ed. 446, 457, 101 S. Ct. 509 (hereafter, *Pepco*).

editions of the *Guides to the Evaluation of Permanent Impairment* promulgated by the AMA require that the hearing loss suffered by an individual must have progressed to an average loss of at least 25dB in the appropriate frequencies before any permanent impairment is assigned to that loss. Second Ed. p. 154 para. 7; Third Ed. p. 166 para. 7. So again, though there may be an injury to the claimant as soon as he shows a measurable hearing loss by audiogram, there is no statutorily defined permanent impairment until the loss progresses over time to the required threshold.

The position advocated by the Director, and adopted by the First Circuit is not supported by the statutory language, by the medical facts set forth in the treatise which they cite, by the case law, by the AMA guides, or by the facts as found by the administrative law judge in this case. The occupational disease of hearing loss, as opposed to a sudden traumatic loss of hearing, simply does not result in an immediate disability in any case, and did not so result in the case of employee Ernest Brown. Though, as the Director states, the full extent of the employee's hearing loss is fixed on the date of retirement (because removal from the injurious stimuli ends the progression of the hearing loss) this does not mean conversely, that any disability resulted immediately from the first exposure. Nor does it mean, as the Director simply asserts without statutory citation, that the time of injury is the date of last exposure to injurious noise.[7]

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[7] In fact, as noted in the next several paragraphs, this "last exposure" argument has been rejected by the Fifth, Ninth, and Eleventh Circuits. See: *Ingalls Shipbuilding, Inc. v. Director,*

(Continued on following page)

II. THE STATE OF THE LAW PRIOR TO THE 1984 AMENDMENTS

In determining how Congress intended to affect claims for loss of hearing through the 1984 amendments to the Act, one must first ascertain the fashion in which such claims were dealt with prior to those amendments.

Prior to the 1972 amendments to the Act[8] if a working employee filed a hearing loss claim his date of injury for filing notice under § 912 and for filing a claim under § 913 was the date of manifestation of his injury; the same date was used for determining his average weekly wage under § 910. *Travellers Insurance Co. v. Cardillo*, 225 F.2d 137, 143 (2nd Cir. 1955).[9]

(Continued from previous page)

OWCP, 898 F.2d 1088, 1092 (5th Cir. 1990); *Todd Shipyards, Corp.v. Black*, 717 F.2d 1280, 1289 (9th Cir. 1983); *Alabama Drydock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 1567 (11th Cir. 1991). Further, the legislative history clearly shows that Congress rejected "last exposure" as the time of injury when it enacted the 1984 amendments: "The conferees specifically reject the date of last exposure to the injurious substance as the time of injury for determination of pay purposes." H. Rep. 98-1027, 98th Cong., 2nd Sess. pp. 29-30.

The Board itself abandoned this approach after the decision of the Ninth Circuit in *Todd, supra*, see *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989).

[8] Enacted as P. L. 92-576, § 1, 86 Stat. 1251.

[9] Quoting this Court's opinion in *Urie v. Thompson*, 337 U.S. 163, 170, 69 S. Ct. 1018, 1025, 93 L. Ed. 1282 (1949) the Second Circuit held that "an employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves."

In 1972 §§ 912 and 913 were amended to assure that time for notice and filing did not start until the employee was aware of the connection between the work and the injury. 86 Stat. § 922. Nothing, however, was done to amend § 910 regarding the date of injury for selecting the appropriate average weekly wage upon which to base the injured employee's compensation. Under BRB decisions prior to *Dunn v. Todd Shipyards Corp.* 13 BRBS 647 (1981) the date of injury for the purpose of calculating the average weekly wage had consistently been held to be the date of manifestation of the disease. See *Todd Shipyards Corp v. Black*, 717 F.2d 1280, 1289 (9th Cir. 1983). In *Dunn, supra*, the Board held that the date of injury for average weekly wage calculations should be the date of the claimant's last exposure to the injurious substance. Reversing prior decisions, the Board in *Dunn* held that rather than receiving compensation based on the wage earned in 1975 (the date of manifestation of the disease) compensation should have been based on the wage earned in 1945 (the date that the employee was last exposed to the asbestos which caused his occupational disease). *Dunn, supra*, 13 BRBS at pp. 649-650. When the case reached the Ninth Circuit, however, this approach was rejected as "ill-considered and contrary to the express provisions of the LHWCA . . . " *Todd Shipyards, supra* p. 1289; see also fn. 6.

Based upon the above cited authorities it appears that until the Board's decision in *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984) a retiree filing a hearing loss claim, would have had his date of injury for notice and filing purposes (§§ 912 and 13) and for average weekly wage (§ 910) all based on the time of manifestation of the injury. Since hearing loss is a scheduled award, no actual

impairment to earning capacity would have to be proven in order for the claimant to recover. *Travellers Insurance Co. v. Cardillo, supra; Pepco.* The claimant's wage would then be determined under the 1972 version of § 910 a-c.[10]

On March 20, 1984 the BRB rendered its decision in *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984) a case which involved a claim for loss of hearing by a retired worker.[11] The Administrative Law Judge rejected the employer's argument that claimant's retirement made him ineligible for benefits, stating that the scheduled awards are conclusive presumptions of a loss of wage earning capacity and cannot be rebutted. *Redick, supra* at p. 156. The BRB, citing its then very recent decision in *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984), held that because the disease had become manifest

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[10] 33 U.S.C. § 910 (Determination of Pay) as it existed prior to the 1984 amendments provided two basic methods of calculating the employee's average weekly wage as of the date of injury (§§ 910(a) and (b)) and contained a catchall provision for cases not covered by the first two subsections.

Section 910(a) dealt with the employee who had worked in the employment in which he was injured during substantially the whole of the year preceding the injury. Section 910 (b) provided the calculation for the employee who had not worked in such employment during substantially the whole of the year preceding the injury. Section 910(c) applied if either of the foregoing methods could " . . . not reasonably and fairly be applied . . . "

[11] So far as counsel for the claimant can ascertain it is the only reported case under the Act up to that time which involved a claim for hearing loss by a retired worker.

subsequent to claimant's voluntary retirement from the work force there could be no loss of wage earning capacity as a result of the condition and thus there could be no award of benefits.[12]

Even the Board has at least tacitly acknowledged that the decision in *Redick*, was wrong. Without specific reference to the earlier case it noted in *Machado v. General Dynamics Corp.*, 22 BRBS 176, 180 (1989) that:

> Prior to the 1984 Amendments permanent partial disability in all cases involving occupational diseases not covered by the schedule [§ 8(c)(1)-(20)], such as respiratory impairment,

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[12] *Aduddell* involved a claim for permanent total disability under § 908(a) and not a claim for a scheduled injury. Reasoning that (1) claimant's time of injury was post-retirement when he was not earning any wages and (2) that the Act provides compensation for disability defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment" the Board held that:

> Under these facts, while it is conceded that the claimant now suffers from asbestosis, claimant has not established that he sustained a loss of wage earning capacity as a result of this injury and no such loss can be reasonably anticipated in the future. Consequently there is no entitlement to compensation under the Act. *Aduddell*, 16 BRBS at p. 133.

Though this may have been a proper holding in the factual situation which faced the Board in that case, i.e. a claim for benefits under § 908(a), it was plainly error to apply this logic to Mr. Redick whose claim for a scheduled injury under this Court's decision in *Pepco* and the Second Circuit's decision in *Travellers Insurance Co. v. Cardillo* did not require any proof of loss of earning capacity or wages.

> was determined under Section 8(c)(21), 33 U.S.C. § 908(c)(21), and employees suffering such disabilities had to prove a loss in wage earning capacity in order to be compensated. Permanent partial disability for hearing loss, however, has been compensated exclusively under the schedule, 33 U.S.C. § 908(c)(13), and thus for these disabilities, loss in wage earning capacity is presumed.

This language is directly contrary to the Board's own holding in *Redick*.

Thus when Congress was formulating the 1984 amendments, hearing loss claims, whether for active or retired workers, could have been handled within the existing case law and statutory structure. The evils sought to be remedied by the occupational disease amendments were not applicable to claims for loss of hearing in the first place.

III. THE BOARD'S INTERPRETATION OF THE ACT BEST TAKES INTO ACCOUNT THE TREATMENT OF HEARING LOSS CASES BEFORE THE 1984 AMENDMENTS, THE INTENT OF CONGRESS IN ENACTING THOSE AMENDMENTS, AND THE LANGUAGE OF THE AMENDMENTS

A. Statutory Construction

The Board has properly resorted to legislative history and utilized accepted rules of construction in considering Congressional intent in cases involving retirees with hearing loss. It is true that the clear language of the Act is the most reliable index of its meaning, but it is also true

that the surest way to misinterpret a statute or rule is to follow its literal language without reference to its purpose. *Viacom International Inc. v. Federal Communications Commission*, 672 F.2d 1034, 1040 (2d Cir. 1982) (citations omitted). Even when the language of the statute to be interpreted appears to be clear on its face, it may be proper to consider congressional intent to ascertain the scope and extent intended. *Director, O.W.C.P., United States Dept. of Labor v. Perini North River Associates*, 459 U.S. 296, 74 L. Ed. 2d 465, 103 S. Ct. 634 (1983).

In *Tidewater Oil Co. v. U.S.*, 409 U.S. 151, 34 L. Ed. 2d 375, 93 S. Ct. 408 (1972) the Court was faced with the interpretation of 28 U.S.C. 1292(b) relating to certain interlocutory appeals. After noting the clarity of the statute and various amendments to it, it held, however, that while the clear meaning of statutory language is not to be ignored: "Words are inexact tools at best (citations omitted) and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history." *Tidewater, supra*, 409 U.S. at 157, 34 L. Ed. 2d at 382-383.

In *Director, OWCP, v. Perini North River Associates*, 459 U.S. 279, 74 L. Ed. 2d 465, 103 S. Ct. 634 (1983) the Supreme Court was faced with the issue of whether the 1972 amendments to the coverage afforded by the Act eliminated from coverage a class of employees which would plainly have been covered under the prior version of the statute. Churchill, the claimant, had been injured over the actual navigable waters of a river while working as a construction worker during the building of a sewage treatment plant. It did not appear that his employment fit the 1972 amendments' "status" requirement that the

employee be engaged "in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker, including a shiprepairman, shipbuilder, and shipbreaker . . . " 33 U.S.C. § 902(3).

The dissent (Stevens, J.), like the employer in this case, found the matter very simple:

> "If we ignore history and merely concentrate on the text of this statute, the conclusion is inescapable that it merely provides coverage for people who do the work of longshoremen and harborworkers – amphibious persons who are directly involved in moving freight onto and off ships, or in building, repairing, or destroying ships." *Perini, supra*, 459 U.S. 297, 328, 74 L. Ed. 2d 465, 487, 103 S. Ct. 634.

The majority, however, found "the question of Churchill's coverage is an issue of statutory construction and legislative intent." *Perini, supra*, 459 U.S. 297, 305, 74 L. Ed. 2d 465, 473, 103 S. Ct. 634. Noting that it has long held that the Act must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results, the court reviewed the decisions construing the pre-amendment statute and the legislative history of the amendments themselves with the result that the employee was found to be covered.

Even in *Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990) where the Fifth Circuit held that retirees with hearing loss should be compensated under § 908(c)(23), the court reviewed the legislative history and the purpose behind the 1984 amendments in formulating its decision.

It is important to remember that when interpreting the Longshore and Harbor Workers' Compensation Act:

> " . . . it is a well settled principle that the Act is to be construed liberally, in order to avoid harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333, 74 S. Ct. 88 (1953). It is an established and accepted policy that worker compensation statutes are to be liberally construed. This court must be guided by the special social policies that this statutory framework is designed to achieve:
>
> > (T)o relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they are enacted and if possible to avoid incongruous or harsh results.
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> *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414, 52 S. Ct. 187 (1932).

B. Claimants agree with the results reached by the Board in determining hearing loss benefits for retirees under Section 8(c)(13) of the LHWCA.

Section 8(c)(13) of the LHWCA provides that compensation for a loss of hearing in both ears shall be paid for a period of two hundred weeks. For a partial loss of hearing the degree of loss is proportionately applied to the number of weeks in the schedule. 33 U.S.C. § 908(c)(19). Pursuant to § 908(c)(13) a claimant is entitled to receive the full two-thirds of his average weekly wage for the proportionate number of weeks. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391 (1983) *aff'd in relevant part*, 751 F.2d 1460, 1464 n. 5, 17 BRBS 29, 32 n. 5 (CRT) (5th

Cir. 1985), *aff'd on reconsideration en banc*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986).

Simply stated, the issue before this Court is whether the Board properly applied § 908(c)(13) in calculating the duration of and compensation for an industrially related hearing loss sustained by the retired claimant. Under the provisions of § 908(c)(13) the claimant received 164.8 weeks of benefits (82.4% of 200 weeks for binaural hearing loss) at a compensation rate of $193.22 (66 2/3 per cent of the national average weekly wage of $289.83) for total compensation of $31,842.66. Pet. App. p.11. Claimant was 68 years old at the time of the hearing in 1988. Had he been compensated under the terms of § 908(c)(23) he would have begun receiving $56.03 per week and would receive that amount until the date of his death because the hearing impairment is permanent. (Under the *Guides to the Evaluation of Permanent Impairment* 2nd ed. mandated by § 902(10) the 82.4% binaural hearing loss converts to a 29% permanent impairment to the whole person and thus into weekly compensation of $56.03. See *Guides, supra*, p. 158 Table 4).

Employer argues and the Fifth Circuit in *Ingalls Shipbuilding, supra*, found, that the plain language of § 908(c)(23) and § 910(d)(2), precludes application of § 908(c)(13) in a case where the claimant is a retiree at the time he learns of his noise-induced occupational hearing loss. Section 908(c)(23) reads as follows:

> Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this title, the compensation shall be 66 2/3 per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 902(10) of this title, payable during the continuance of such impairment.

Pursuant to § 908(c)(23) then, the impairment rating is applied to a percentage of a claimant's average weekly wage to determine the compensation rate, which is to be paid to the claimant for the duration of his impairment. In contrast, § 908(c)(13) utilizes the impairment rating to determine the number of weeks of compensation for the loss. Compensation is paid for the calculated term at the full compensation rate.

Bath Iron Works urges that § 908(c)(23) automatically applies because of the language identifying the relevant claims as those in which the average weekly wages are determined under § 910(d)(2) of the Act. Section 910(d)(2) specifies the average weekly wage to be employed in claims for death or disability due to an occupational disease for which the time of injury occurs post-retirement.

The Board rejected Employer's argument by distinguishing hearing loss from other occupational diseases. *Fairley v. Ingalls Shipbuilding Inc.*, 22 BRBS 184 (1989), *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989). The Board stated that the 1984 amendment implemented by § 908(c)(23) was meant to provide a remedy for retirees suffering from permanent partial disability in cases of occupational diseases not covered by the schedule, such as respiratory ailments. *Id.*, at 22 BRBS 187. Because respiratory impairments were compensated

solely under § 908(c)(21) unlike an injury such as hearing loss specifically identified in the schedule provisions of §§ 908(c)(1)-(20), prior to the 1984 amendments an employee suffering from this type of occupational disease had to prove a loss of wage earning capacity to establish entitlement to compensation. *Id.*, 22 BRBS at 187. Accordingly, the Board had previously denied benefits to a claimant suffering from asbestosis who voluntarily retired from the work force for reasons unrelated to his occupational disease because he could not show a wage loss resulting from his disability. *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984), fn 12. Review of the legislative history of the 1984 amendments reveals that Congress expressly intended to overrule *Aduddell* by legislatively expanding the category of eligible claimants to include those workers who discover the existence of their occupational diseases subsequent to their retirement when they are unable to prove a wage loss resulting from injury. H. Rep. 98-1027, 98th Cong., 2d Sess. p. 30.

The Board noted in *Fairley, supra*, and *Machado, supra*, that § 908(c)(23) if strictly interpreted could be applied to compensate retirees with a hearing loss. *Id.*, 22 BRBS at 187. However, the Board stated that hearing loss claims have "historically been compensated in a different manner from unscheduled occupational diseases", *Fairley*, 22 BRBS at 187, and that such an interpretation of the statute would contravene the exclusivity of the schedule. *Id.*, 22 BRBS at 187. The Board cited this Court's decision in *Pepco* for the proposition that since a hearing loss is contained in the schedule found at §§ 908(c)(1)-(20), recovery for such an injury is restricted to a specific number of weeks, and that it would be incongruous to

treat voluntary retirees with a hearing loss differently from all other employees covered by § 908(c)(13).

Additionally, the *Fairley* decision listed other considerations for approving a scheduled award, stating that such an award provides a readily calculable amount of compensation, promotes swift claim resolution and administrative efficiency. *Id.*, 22 BRBS at 188.

Employer contends that the Board disregarded the express language of § 908(c)(23) in concluding that retirees could be compensated for hearing loss under § 908(c)(13). However, a literal application of statutory language is inappropriate if it would produce a result that conflicts with the legislative purpose clearly manifested in an entire statute or with clear legislative history. *Almendarez v. Barret-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985) (citing *United Steelworkers v. Weber*, 443 U.S. 193, 201, 61 L. Ed. 2d 480, 99 S. Ct. 2721, 2726 (1979)).

C. The House amendments treated hearing loss claims separately from other occupational disease claims.

As noted above, the Board based its position in part on the differing treatment accorded hearing loss claims in terms of how they have historically been compensated, i.e., as the only scheduled occupational disease. A review of the legislative history of the 1984 amendments reveals the efforts of Congress to remove obstacles to the filing of claims and to fairly compensate both hearing loss and other occupational diseases. It shows a continuing debate on the issue of whether hearing loss is to be lumped

together with other occupational diseases for some or all purposes under the Act.

H. Rep. 98-570, 98th Cong., 1st Sess. part 1 (1984) contains separate explanatory sections dealing with hearing loss (pp. 9-10) and occupational disease (pp. 10-12).

The House gave presumptive effect to an audiogram if it met certain criteria for reliability including the requirement that the audiogram be accompanied by a report which is provided to the employee. One of the purposes of the report was to alert the employee to the possibility of filing a claim against the current or former employer.

Due to the presumptive quality accorded the audiogram as to the extent of the hearing loss, the House Committee also mandated that the time for giving notice of a claim under 33 U.S.C. § 912(a) and for filing a claim under 33 U.S.C. § 913 would not begin to run until the employee received a copy of the audiogram and the report. H. Rep. 98-570, p. 10.

Nothing in the explanatory text of the report referring specifically to hearing loss discusses which section of the Act controls for the purposes of determining the amount of the average weekly wage in such claims.

The House was also concerned with the "procedural hurdles" encountered by victims of "long latency occupational diseases" and sought to insure that these disease victims received compensation which was adequate to their current needs. H. Rep. 98-570, p. 10. Noting unspecified "decisional law" concerning the notice and statute of limitations provisions (§§ 912 and 913), the

report shows that the House was concerned largely with hurdles placed by the notice and filing provisions in the path of those suffering from long latency occupational diseases. As an answer the House proposed to eliminate completely the requirement of notice in such cases. To that end the bill as enacted by the House amended § 912(a) to read as follows:

> Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of the relationship between the injury or death and the employment, **except that in the case of an occupational disease which does not immediately result in a disability or death, such notice shall not be required** . . . H. Rep. 98-570, p. 52 (emphasis added).

Since the House had already in § 908(c)(13)(ii) mandated that notice must be filed in cases of occupational hearing loss, the obvious intent was to distinguish such cases from other types of occupational diseases for notice purposes. Given the House provision that the notice period did not begin to run until the employee received an audiogram and explanatory report this is understandable. Those two documents would alert the worker to the need to give notice to the employer.

In addition it specifically required in § 908(c)(13)(ii) that a claim for hearing loss must be filed within one year after the employee had received an audiogram and report. Again hearing loss was treated differently from

other occupational diseases. For other diseases amended § 913 mandated that the claim must be filed within one year after the disease has impaired the claimant's earning capacity or has resulted in a diminution of wages and the employee becomes aware or should have become aware of the connection between the employment, the disease and the disability. H. Rep. 98-570, p. 53.

What did the House intend then with respect to the calculation of the average weekly wage in hearing loss and other occupational disease cases; was the same date to be used? The amendments to § 908(c)(13) which dealt specifically with hearing loss and which set the time of injury for the purposes of giving notice and filing claims are silent on the question of the time of injury for the calculation of the rate of pay (H. Rep. 98-570, p. 43). The explanatory text which discusses those amendments is also silent (pp. 9-10, 27).

The House amended § 910 to deal with the calculation of the weekly wage in occupational disease cases. By adding a new sub-section (e) the bill provided that the date of injury in such cases was the date of onset of the disabling condition. H. Rep. 98-570, p. 50. The explanatory text (p. 12) notes the desire of the House to assure that compensation for an occupational disease should be "reasonable to the needs of the victim . . . " and specifically rejected the holding of the BRB in *Dunn v. Todd Shipyards*, 13 BRBS 647. In *Dunn*, the Board had held that the date of injury in an occupational disease case under § 910 of the Act should be deemed to be the date of last exposure to the injurious stimuli which caused the disease. *Dunn, supra*, p. 649. Benefits were awarded to the widow of a deceased worker whose asbestosis became

disabling in 1975 based upon the wage he was making in 1945, the date he was last exposed to asbestos fibers.

Obviously determined to see that occupational disease claimants received some "reasonable" amount of compensation, the House provided in amended § 910(e) that the "date of onset of the disabling condition" is the time of injury for setting compensation. H. Rep. 98-570, p. 50. Since occupational diseases may take a long time to develop, the House recognized that the employee might no longer be working in covered employment, or be working only part-time, or that he might no longer be employed at all. To deal with those situations it mandated that the wage earned immediately before the onset of the disabling condition be used. H. Rep. 98-570, p. 12. Further, it set a floor for the wage at the National Average Weekly Wage as determined by the Secretary of Labor under § 906(b). H. Rep. 98-570, pp. 12, 50.

The House was not consistent in its references to occupational disease; for instance, in its amendments to § 912 and § 913 regarding notice and filing deadlines it referenced occupational disease "which does not immediately result" in a disability or death, while in setting out the appropriate date for compensation purposes it simply referred to "occupational disease" without that qualifier. It is clear that the House had a specific meaning in mind for the phrase: "disease which does not immediately result in death or disability." At page 11 of the H. Rep. 98-570 the phrase is defined:

> By this, the Committee means to describe disabling conditions which do not develop immediately after the initial change in the body of the

> worker resulting from exposure to a toxic substance or harmful physical agent, or which do not even result in a change in the body immediately after the exposure to the causative toxic substance or harmful physical agent.

Having referenced *Dunn v. Todd Shipyards, supra*, the House was aware from the Board's discussion of occupational diseases in that case (see 13 BRBS 647, at pp. 652-653) that there are at least three categories of occupational diseases based on the concept of latency periods. There are those which have virtually no latency period and are thus similar to traumatic injuries (exposure to certain insecticides and hydrocarbon solvents were cited as belonging to this category); there are those such as asbestosis with latency periods of up to fifty years; and there are those such as hearing loss which become progressively worse with increased exposure to the harmful stimuli. Though the ultimate holding of *Dunn* as to the date of injury was rejected by the House, it appears that it recognized the various categories of occupational disease for it singled out long latency occupational disease for special treatment regarding notice and filing, singled out hearing loss for special treatment in the same area, and then, concerned that victims of all occupational diseases receive adequate compensation, mandated in § 910 that wages be calculated as of the date of onset of the disabling condition and in no event be based on a wage less than the National Average Weekly Wage. Also, no specific mention is made in the House Report of concern with "retirees", but only of those who for any reason might be employed in other than covered employment under the Act, or in part time employment, or unemployed at the time of onset of the disability.

Before the bill went to Conference then, the House had singled out hearing loss for specific treatment in § 912 and § 913 regarding notice and statute of limitations. It left hearing loss as the only occupational disease compensated without evidence of lost earning capacity. Whether the House intended to treat hearing loss cases the same for the purposes of calculating the average weekly wage is not at all clear. Section 910(e) calls for the wage to be that earned at the time of the onset of the disabling condition as calculated in accordance with § 910(a)-(d). This approach could be applied to those suffering from hearing loss, but the explanatory text states that:

> Under the provisions of the new section 10(e), disability benefits for a worker who is found to be disabled as a result of an occupational disease would be expressed as the appropriate percentage of the worker's last wage prior to the onset of the disability, or (in cases of a worker who was not employed, or not employed full-time immediately prior to the onset of the disability) the appropriate percentage of the National Average Weekly wage on the date of onset of the disability, whichever was the greater amount . . . H. Rep. 98-570, p. 12.

Since hearing loss was compensated pursuant to the schedule in § 908(c), however, an award is based not on a percentage of the average weekly wage but is based on the full compensation rate for a specified number of weeks.[13] In the event of a partial loss, the employee

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[13] In the case of total loss of hearing the claimant is entitled to 200 weeks of compensation. 33 U.S.C. § 908(c)(13).

receives an award for a proportionate number of weeks under § 908(c)(19), *Bath Iron Works v. Director, OWCP*, 942 F.2d 811, 813.

If the House did not intend to apply § 910(e) to hearing loss cases it could have meant to leave in place those decisions such as *Travelers Insurance v. Cardillo* which held the average weekly wage to be that in effect at the time of manifestation of the disease.

D. The Conference Committee continued the separate treatment of hearing loss and other occupational diseases for the purposes of compensation.

The Conferees' bill made one change specifically affecting the manner in which hearing loss cases were to be compensated. H. Rep. 98-1027, 98 Cong. 2 Sess., pp. 27-28. Under the Board's decision in *Princ v. Todd Shipyards Corp.*, 12 BRBS 190 (1980) a claimant with a 63% hearing loss was hired by the employer. The loss progressed during employment to a 91% loss. Section 908(f) allows the employer to shift some of the compensation burden to the Special Fund created by the Act when a work related permanent partial disability results from a combination of pre-employment disability and work related disability. Interpreting the previous version of that section the Board in *Princ* held the employer liable for 104 weeks of compensation rather than the 56 weeks which represented the percentage of loss which it had

actually caused.[14] The statute at that time required the employer to pay the amount of the loss attributable to the employment or to pay 104 weeks "whichever is the greater." Noting this holding, the Conferees amended § 908(f) in a manner that applied only to hearing loss cases "within the provisions of section 8(c)(13)" to provide that in such cases only, the employer shall pay the loss attributable to the employment or 104 weeks whichever is smaller.

With respect, then, to the source of compensation in hearing loss cases the 1984 amendments singled out hearing loss for special treatment, indicating that Congress intended to compensate hearing loss claimants differently from other occupational disease victims. See concurring opinion, Brown, AAJ at pp. 182-183, *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989). If Congress had attempted to rectify an inequity which required employers to pay more than their "share" in hearing loss cases, why did it restrict the benefits of the amendment only to claims compensable under § 908(c)(13)? If retired hearing loss claimants are to be compensated under § 908(c)(23) which provides for a percentage of the average weekly wage to be paid for the duration of the impairment, then every case will result in the employer paying the maximum of 104 weeks of compensation. Since hearing loss is permanent the impairment lasts for the worker's lifetime; the only eventuality which saves the employer from paying the entire 104 weeks is the

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[14] Total deafness is compensated by 200 weeks of compensation so the proportion represented by the 28% loss attributable to employment was 56 weeks.

employee's death before the expiration of the two year period.

The comments of Senator Hatch in the conference report on the amendments reflect that occupational disease claims were a topic of special concern. Noting that the LHWCA had been interpreted in certain instances to frustrate the purposes of the statute, Senator Hatch related that the amendments relative to occupational disease were designed to compensate the claimants in a fair, adequate and expeditious manner. 130 Cong. Rec. S11624 (daily ed. Sept. 20, 1984).

As previously stated the amendments were drafted to assure that a retiree with an occupational disease which became manifest after retirement would not be denied benefits in recognition of the fact that a retired claimant is just as disabled and in need of financial support as an active worker. 130 Cong. Rec. H9731 (daily ed. Sept. 18, 1984). Congress legislatively overruled *Aduddell, supra,* and *Worrell v. Newport News Shipbuilding and Dry Dock, Co. (ALJ),* 16 BRBS 216 (1984), which denied benefits to retirees, and *Dunn v. Todd Shipyards,* 13 BRBS 647 (1981) which set compensation at outrageously low rates by modifying the definition of disability in § 902(10), 33 U.S.C. § 902(10), for retirees to mean permanent impairment of bodily function and capacity, thereby obviating the need for a retiree to demonstrate a wage loss to prove entitlement to compensation. 130 Cong. Rec. H9731 (daily ed. Sept. 18, 1984). Because a retiree has no wages on which to base compensation, the amendments to § 910 of the Act establish a wage based either on actual past earnings of the retiree if the time of injury occurs less than one year after retirement or the national average

weekly wage at the time of manifestation if the disability is discovered more than one year after retirement. 33 U.S.C. § 910(d)(2).

The Conference version of the bill probably provided more generous benefits to retirees than the House version. The latter called for the wage of an unemployed worker to be the National Average Weekly Wage at the time of onset of the disability. The version enacted into law as § 910(d)(2) called for the wage for retirees to be the employee's actual wage at the time of retirement if the date of injury occurred within one year of the date of retirement otherwise it would be the National Average Weekly Wage. In most cases the workers' actual wage would be far higher.

In the Senate, Senator Hatch discussed the intent of the Conferees with respect to retirees afflicted with occupational disease. In doing so he referred to *Redick v. Bethlehem Steel Corp.,* 16 BRBS 155 (1984) as one of a number of cases involving retirees with occupational disease who had been denied benefits (the others were *Aduddell,* and *Worrell, supra*). In *Redick,* the Board had denied compensation to a retiree with a hearing loss (see fn. 12) because he was retired at the time of the injury and thus suffered no loss of earnings or earning capacity. The employer has cited that reference as evidence concerning the intent of Congress to include retiree hearing loss claims within the "retiree amendments." Employer's Brief, p. 15. Senator Hatch's remarks are the only mention of *Redick* in the legislative history (Representative Miller in the House debate did not cite *Redick* as one of the cases

which the amendments were designed to overrule). 130 Cong. Rec. H9731 (daily ed. Sept. 18, 1984)).

Senator Hatch stated that the Conferees felt that these cases "did not represent equitable policy" in that one's eligibility for compensation should not depend on the fortuity of when he becomes disabled. That does not mean conversely that the bill was intended to lump hearing loss together with other occupational disease for the purpose of computing the amount of compensation, especially in light of the historical differences in the method of compensating hearing loss claims under the schedule.

Occupational diseases also received special treatment in discovery, notice and filing provisions. Section 10 was amended to establish the time of injury as the date of a claimant's actual awareness of the relationship between his employment and the disease or the date he should have been aware by exercise of reasonable diligence or reason of medical advice. 33 U.S.C. § 910(i). The notice-filing period was extended to one year and the claim-filing period to two years from the time of injury in recognition of the subtleties of occupational disease and the difficulties of linking a disease to a particular job or substance in the distant past. 33 U.S.C. § 910(a); § 913(b)(2); 130 Cong. Rec. H9730, H9731 (daily ed. Sept. 18, 1984). Congress continued, however, the differentiation between hearing loss and other occupational disease by retaining the House requirement that hearing loss sufferers first receive an audiogram and report before the time periods begin to run. 33 U.S.C. § 908(c)(13)(D).

Relative to occupational hearing loss claims, Congress also passed extensive legislation amending § 908(c)(13). Section 8(c)(13) now requires that determinations of the extent of hearing loss be based on AMA guidelines, clarifies the evidentiary value of audiograms and mandates that the statute of limitations shall not begin to run until the employee is given a copy of an audiogram with an accompanying report.

Claimants urge that the extensive amendments to § 908(c)(13) are the best indicia of congressional intent to treat hearing loss claims separately from other occupational diseases, regardless of whether or not the claimant is a voluntary retiree. Unlike other occupational diseases, which must be dealt with under § 908(c)(21), hearing loss claims have their own provisions for rating the extent of disability and designating the time of injury for compensation and notice and filing without reference to the amendments contained in §§ 902(10) and 910(i). Surely Congress did not intend to be needlessly repetitive but rather intended that hearing loss claims be treated exclusively in the schedule.

There is no justification for treating a claimant who has sustained an occupational hearing loss differently on the basis of whether or not he is a retiree. Pursuant to § 908(c)(13) the extent of impairment for both worker and retiree must be based on AMA Guides, each much receive a copy of an audiogram and report to determine the time of injury and commence the running of the prescriptive period, and neither need show an actual loss of wages to be entitled to benefits.

The lack of requirement to show actual harm to wage earning capacity is especially noteworthy, and was discussed in detail in *Pepco*. The Supreme Court stated that inasmuch as a loss of wage earning capacity is presumed in claims arising under the schedule, economic factors are not considered. *Pepco, supra*, 449 U.S. at 277, 283, 66 L. Ed. 2d at 453-454, 457, 101 S. Ct. at 514, 517; *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 143-144 (2d Cir.), *cert. denied*, 350 U.S. 913, 76 S. Ct. 196, 100 L. Ed. 800 (1955).

Other considerations further support the Board's application of § 908(c)(13) in the instant case. A hearing loss is limited in effect to the injured part of the body, whereas other occupational illnesses such as asbestosis may extend in effect to other parts of the body.

Once the worker is removed from or protected from the injurious stimuli the measurable disability due to harmful levels of noise exposure will not increase. R. T. Sataloff and J. Sataloff, *Occupational Hearing Loss*, 357 (1987). This is not the case with the more common types of occupational disease being compensated under the LHWCA today, such as mesothelioma, silicosis, or other types of occupational respiratory diseases. These types of occupational diseases will often and most commonly not appear until after the worker has retired. Once the latency period is over, they will manifest with some form of impairment, usually low at first, but growing steadily, often resulting in the death of the retired worker.

In fashioning a remedy for this type of occupational disease Congress needed a flexible approach that would result in a fair and predictable method of calculation of

benefits which would keep pace with the growing disability. The above considerations are not present with hearing loss claims. The bulk of the loss and impairment will occur, often imperceptibly, but gradually over first ten years of exposure. The impairment is established while the worker is still in the labor force. Once the worker is removed the noise related impairment ceases to grow; it is fixed for all time. Work related hearing loss will not have the same type of pathology on the worker's general health as the other types of occupational disease. The worker will not have the same need for a flexible rule to escalate compensation with the growing level of disability. The retired worker will not be subject to a dynamic pathology that will have a continuing effect on his or her health.

Congress sought to set up a comprehensive approach to calculation of compensation for these types of occupational diseases. The formula established for retirees is premised on the concept of disability since retirees no longer have a wage earning capacity. Section 902(10). By using the disability formula in § 908(c)(23) the compensation rate is keyed to the worker's last wage or the national rate set by the Secretary and to the overall disability of the worker. As disability increases so does entitlement to benefits. This view can be seen in the Senate Report:

> The effect of Aduddell and Worrell (both involving occupational diseases from exposure to asbestos) (explanation provided), . . . , is to deny to employees and their survivors part of the

> benefit of the bargain . . . The conference substitute . . . makes express provision for the payment of benefits to retirees who become disabled during retirement as a result of an occupational disease. It should be noted . . . that the type of benefits paid to a retiree whose disease manifests itself during retirement will be considered a species of permanent partial disability . . . This impairment will be evaluated under the guidelines of the AMA. It should be noted that by being considered a form of permanent partial disability, a retiree's impairment cannot legally ripen into a permanent total disability for the purposes of the act. 130 Cong. Rec. S11625 (daily ed. Sept. 20, 1984).

The above language reflects that Congress had searched for a more flexible method to calculate and administer claims that are not static, as in the case of hearing loss. The comments continue in a vein that indicates a claim for occupational disease benefits under § 908(c)(23) may ripen into a claim for death benefits. In contrast, a hearing loss will never be a species of occupational disease that will result in death of the Claimant.

To compensate retiree hearing loss claimants under § 908(c)(23) as argued by Employer makes no economic sense. The proper application for § 908(c)(23) only emerges when considering occupational diseases that have a gradually increasing deleterious effect on the health of the claimant as a whole. It is only then that the formula set out in this section begins to make economic sense, that is, providing a fair and realistic basis from which compensation can be set when faced with conditions that will continue to grow worse and affect the health of a claimant generally.

In cases of scheduled permanent partial disabilities, if a claimant dies from causes unrelated to the injury, the total amount of the award unpaid at the time of his death is payable under § 908(d)(1) of the Act. 33 U.S.C. § 908(d)(1). If Section § 908(c)(23) were applied to a retiree hearing loss, by which benefits are payable only during the continuance of the impairment, the surviving spouse or other statutory survivor would be precluded from further recovery. This appears to be an unnecessarily harsh result, particularly when one considers that in an instance where death is caused by an occupational disease such as asbestosis, a claim may be made for death benefits as provided in Section 9 of the Act. 33 U.S.C. § 909.

In *Machado*, the Board noted that using the method advanced by the employer: applying § 908(c)(23) and arguing that this section mandates the use of a whole man conversion, with § 910(i) and § 910(d)(2)(B), the claimant would receive a minimal amount of compensation for life. While using the compensation rate for retirees strictly under the schedule, § 908(c)(13), § 910(i) and § 910(d)(2)(B) the benefits will closely approximate those of the workers still in the labor force, it will also promote an easily calculable amount of compensation, and promote speedy resolution of claims and their administration. *Machado*, 22 BRBS 181. The Board concluded that hearing loss benefits were properly compensable under § 908(c)(13), even in the case of retirees, and that Congress could not have intended the result argued for under § 908(c)(23). *Id.*

As already noted, another significant factor was considered by Administrative Appeals Judge Brown in his

concurring opinion in *Machado*. Judge Brown noted that § 908(f) was amended in 1984 to provide a specific exception for hearing loss claims falling under § 908(c)(13). *Id.*, 22 BRBS 183. For hearing loss claims an employer pays compensation for injury caused by employment at its facility, or 104 weeks of compensation, whichever is lower. Judge Brown opined that the Conference Report's comment that the change covered hearing loss cases compensated under Section 8(c)(13) signaled congressional intent to compensate hearing loss claims pursuant to § 908(c)(13). *Id.*, 22 BRBS at 183 (emphasis in original).

Based on the foregoing discussion, Claimants maintain that the Board correctly determined that hearing loss claims are to be Compensated under § 908(c)(13) regardless whether the claimant is an active or retired employee.

IV. IN THE EVENT THAT THE DECISION OF THE FIRST CIRCUIT IS SUSTAINED, CLAIMANT SHOULD BE ALLOWED TO RETAIN THE BENEFITS WHICH HE HAS RECEIVED UNDER THE DECISION OF THE BENEFITS REVIEW BOARD.

As should by now be obvious, the decision of this Court will directly affect the amounts to be received as compensation by retirees with hearing loss. As noted by the court below, however, it should not affect this particular claimant. The First Circuit found that the issue of whether Mr. Brown's compensation should be other than that awarded by the Board had been waived. *Bath Iron Works v. Director, OWCP*, 942 F.2d 811, 819 (1st Cir. 1991). The employer has not challenged that finding on appeal

so that portion of the First Circuit's opinion must be sustained.

V. CONCLUSION

Claimant respectfully requests that the Court reverse the decision of the First Circuit and remand with an order to affirm the Decision and Order of the Benefits Review Board.

In the event that the decision of the First Circuit is affirmed, claimant prays that on remand no further calculation of benefits be ordered, but that the previously awarded compensation be affirmed.

Respectfully submitted,

RONALD W. LUPTON
Attorney for Respondent Employee
STINSON, LUPTON & WEISS, P.A.
280 Front Street
Bath, Maine 04530
(207) 442-8781